FILED
FEB 1 1975
MICHAEL RODAK, JR., CLERK

No. 73-6336

In the Supreme Court of the United States

OCTOBER TERM, 1974

GEORGE HERMAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN KEENEY,
Acting Assistant Attorney General,
A. RAYMOND RANDOLPH, Jr.,
Deputy Solicitor General,
WILLIAM L. PATTON,
Assistant to the Solicitor General,
MARSHALL TAMOR GOLDING,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provision and statute involved	3
Statement	3
Introduction and summary of argument	9
Argument:	
I. A defendant who voluntarily makes a declaration, comprehending the meaning of his words, is guilty of an offense under 18 U.S.C. 871(a) if a reasonable person would conclude that his declaration constituted a serious expression of his apparent intention to kill or injure the President	11
A. The statute does not require as an element of the offense that the defendant subjectively intended to carry out his threat to kill or injure the President	13
B. The objective *Ragansky-Roy* standard satisfies the demands of the First Amendment	19
II. Substantial questions are presented concerning the validity of petitioner's conviction	25
Conclusion	32

568--184--75---1

CITATIONS

Cases:

	Page
Adickes v. *S. H. Kress & Co.*, 398 U.S. 144	28
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	9
Barnes v. *United States*, 412 U.S. 837	27
Bass v. *United States*, 239 F. 2d 711	18
Brandenburg v. *Ohio*, 395 U.S. 444	20
Browder v. *United States*, 312 U.S. 335	17
Chaplinsky v. *New Hampshire*, 315 U.S. 568	21, 23, 24, 25
Coates v. *City of Cincinnati*, 402 U.S. 611	24
Cohen v. *California*, 403 U.S. 15	24
Cook v. *United States*, 379 F. 2d 966	29, 30
Debs v. *United States*, 249 U.S. 211	20
Demetree v. *United States*, 207 F. 2d 892	32
Dennis v. *United States*, 341 U.S. 494	22, 25
Frohwerk v. *United States*, 249 U.S. 204	23
Gitlow v. *New York*, 268 U.S. 652	20
Glasser v. *United States*, 315 U.S. 60	27
Gooding v. *Wilson*, 405 U.S. 518	23, 24
Hamling v. *United States*, No. 73–507, decided June 24, 1974	5, 24
Herndon v. *Lowry*, 301 U.S. 242	24
Jackson v. *United States*, 386 F. 2d 641	30
Lawn v. *United States*, 355 U.S. 339	28
Krull v. *United States*, 240 F. 2d 122, certiorari denied, 353 U.S. 915	29
Mull v. *United States*, 402 F. 2d 571, certiorari denied, 393 U.S. 1107	30
New York Times Co. v. *Sullivan*, 376 U.S. 254	25
Powell v. *Texas*, 392 U.S. 514	26
Ragansky v. *United States*, 253 Fed. 643	11, 12, 13, 20, 23, 24
Roy v. *United States*, 416 F. 2d 874	11, 12, 13, 23, 24
Schenck v. *United States*, 249 U.S. 47	20

Cases—Continued

	Page
Screws v. *United States*, 325 U.S. 91	17
Shields v. *United States*, 273 U.S. 583	31
Spies v. *United States*, 317 U.S. 492	17
State v. *Chaplinsky*, 91 N.H. 310, 18 A. 2d 754	24
Thlinket Packing Co. v. *United States*, 236 Fed. 109	29
United States v. *Allen*, 317 F. 2d 777	16
United States v. *Arriagada*, 451 F. 2d 487	31
United States v. *Bishop*, 412 U.S. 364	32
United States v. *Calabro*, 467 F. 2d 973	31
United States v. *Compton*, 428 F. 2d 18, certiorari denied, 401 U.S. 1014	12
United States v. *Glick*, 463 F. 2d 491	31, 32
United States v. *Hall*, 493 F. 2d 904 (C.A. 5), petition for a writ of certiorari pending, No. 73–7097	12
United States v. *Hart*, 457 F. 2d 1087, certiorari denied, 409 U.S. 861	12
United States v. *Holder*, 302 F. Supp. 296, affirmed on opinion of the district court, 427 F. 2d 715	18
United States v. *International Minerals & Chemical Corp.*, 402 U.S. 558	26
United States v. *Jasick*, 252 Fed. 931	20
United States v. *LeVison*, 418 F. 2d 624	18
United States v. *Lincoln*, 462 F. 2d 1368, certiorari denied, 409 U.S. 952	12
United States v. *Maisonet*, 484 F. 2d 1356	18
United States v. *Mankowski*, 179 F. Supp. 667	
United States v. *Marr*, 428 F. 2d 614	29, 30
United States v. *Murdock*, 290 U.S. 389	17
United States v. *Neal*, 365 F. 2d 188	30
United States v. *Nusz*, 462 F. 2d 617	19
United States v. *Patillo*, 431 F. 2d 293, adhered to *en banc*, 438 F. 2d 13	11, 13, 17

BEST COPY AVAILABLE

Cases—Continued

	Page
United States v. *Schor*, 418 F. 2d 26	31
United States v. *Stickrath*, 242 Fed. 151	20
United States v. *Sullivan*, 329 F. 2d 755, certiorari denied, 377 U.S. 1005	16
United States v. *United Mine Workers*, 330 U.S. 258	15
Watts v. *United States*, 394 U.S. 705	9, 14, 19, 20, 23, 26
Watts v. *United States*, 402 F. 2d 676, reversed on other grounds, 394 U.S. 705	12, 13, 14–15
Whitney v. *California*, 274 U.S. 357	20

Constitutional provisions and statutes:

United States Constitution, First Amendment	3, 10, 12, 19, 20, 21, 22, 23, 25, 26
Act of February 4, 1917, 39 Stat. 919, as amended, 69 Stat. 80, 76 Stat. 956	14
18 U.S.C. 35(a)	16
18 U.S.C. 245	21
18 U.S.C. 844(e)	19
18 U.S.C. 871	4, 7, 12, 14, 18, 19, 21
18 U.S.C. 871(a)	2, 3, 9, 10, 13, 14, 16, 17, 18, 19, 20, 25
18 U.S.C. 875(b)	18
18 U.S.C. 875(c)	18
18 U.S.C. 875–877	21
18 U.S.C. 876	18
18 U.S.C. 877	18
18 U.S.C. 1503	21
18 U.S.C. 1505	21
18 U.S.C. 1509–1510	21
18 U.S.C. 1621	21
18 U.S.C. 1623	21
18 U.S.C. 3056	7
18 U.S.C. 4208(a)(2)	4

Miscellaneous:

	Page
Fed. R. Crim. P.:	
Rule 31(d)	30
Rule 43	31
H. Rep. No. 652, 64th Cong., 1st Sess.	14
Report of the President's Commission on the Assassination of President Kennedy (the "Warren Commission Report") (1964)	16–17
Working Papers of the National Commission on Reform of Federal Criminal Laws 128 (1970)	17

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6336

GEORGE HERMAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 53-55)[1] is reported at 488 F. 2d 512.

JURISDICTION

The judgment of the court of appeals (App. 56) was entered on January 14, 1974. The petition for a writ of certiorari was filed on March 2, 1974, and was granted on October 15, 1974 (App. 57). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "App." refers to the Joint Appendix filed with this Court. "Tr." refers to the transcript of the district court proceedings.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 871(a), which prohibits anyone from "knowingly and willfully" making "any threat to take the life of or to inflict bodily harm upon the President of the United States," requires as an element of the offense that the maker of the threat subjectively intended to carry it out.

2. Whether the district court's communication to the jury without notice to counsel, that it would accept a verdict of guilty with a recommendation of leniency, requires reversal of the conviction.[2]

[2] The questions presented by petitioner are as follows (Pet 2–3):

"(1) Whether utterances by an individual that he is 'going to Washington to whip the ass off' the President interspersed throughout attempted discussions about President Nixon's trip to Red China constitutes a true 'threat' within the meaning of 18 U.S.C.A. 871(a) as interpreted by the United States Supreme Court in Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399 (1969); or whether such declarations, in the context of the conversation, merely constitute political hyperbole in the nature of a verbal reprimand or crude method of stating political opposition to a course of action adopted by the President?

"(2) Whether the statutory requirement of willfulness is met when the maker 'voluntarily and intelligently *utters the words* as a declaration of an *apparent determination* to carry out the threat'; or whether the congressional intent was to proscribe the willful utterance or publication of language with the intent or under such circumstances that the operative effect of the words constitute a 'threat' to the President of the United States?

"(3) Whether Congress could constitutionally promulgate legislation, which, as judicially construed punishes the use of a form of pure speech, without proof of any relationship between the utterances, its tendency, and the intent with which it is made, and the substantive evils at which the statute is directed?

"(4) Whether repeating the statement to police officers in the course of their investigation and in response to the officers' questions may properly form the basis of separate and punishable offenses (counts) in an indictment?

"(5) Whether a citizen of the United States can be convicted and sentenced to five years imprisonment, *plus* an additional five years supervised probation period, for thoughtlessly interjecting into attempted *conversations* about President Nixon's trip to Red China such statements as—'I am going to Washington and beat up Nixon.'?"

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

18 U.S.C. 871(a) provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The First Amendment to the Constitution provides in pertinent part:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of five counts of threatening to

568—184—75——2

inflict bodily harm on the President, in violation of 18 U.S.C. 871. He was sentenced to five years' imprisonment on each count, subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2) to be followed by five years' supervised probation on the condition that he join Alcoholics Anonymous. The sentence on the last four counts was to run concurrently and "to be suspended during good behavior" (Tr. 196). On June 11, 1974, petitioner's sentence was reduced to three years imprisonment on each count.[3]

On December 24, 1974, petitioner was released from confinement, having accumulated sufficient "good time" credits. He remains subject to five years' supervised probation.

The evidence at trial established that at approximately 6:30 in the morning of March 24, 1972, petitioner entered the dining area of a Holiday Inn in Shreveport, Louisiana (App. 7). He began acting in an "odd" manner, laughing boisterously and attempting to engage others in conversations (App. 10). Upset over President Nixon and his upcoming trip to Peking, petitioner announced his intention to go to Washington to "whip Nixon's ass" or "to kill him in order to save the United States" (*e.g.*, App. 8, 12, 14, 19).[4] Petitioner also indicated that he was Jesus

[3] At oral argument before the court of appeals, the government had indicated that it would not oppose a motion for reduction of sentence.

[4] The basis of the first three counts of the indictments were similar threats made in the presence of a waitress, cashier and customer. We note that the *amicus curiae* brief filed by the American Civil Liberties Union is based on the erroneous premise that petitioner threatened only to "whip Nixon's ass" (see *amicus* brief, p. 3).

Christ and that part of his misgivings about the President's impending trip to Peking stemmed in part from his belief that the Chinese had a bomb only he was aware of, a bomb they might use on the people in this country (App. 8).

According to a waitress, petitioner "wasn't making a lot of sense" (App. 8), but she was not "scared by his remarks" until he offered to buy her "pink pants" (App. 13).[5] At trial, when asked if she believed petitioner was serious in saying he was going to "whip Nixon's ass," Margie Walker, a second waitress testified, "He wasn't laughing. I thought he might" (App. 18).

The waitress testified that she asked the cashier to call the police in order to get petitioner out of the dining room (App. 12–13). When Officer Page (who re-

[5] Although no question has been raised by petitioner here (and none was raised in the district court or the court of appeals), we note that there was a variance between the charge contained in count three of the indictment and the proof adduced at trial. Count three charged that petitioner wilfully and knowingly made a threat, in the presence of Mildred Cruz, to take the life of, and to inflict bodily harm upon, the President stating "substantially as follows: 'If I could get to Nixon, I would kill him'" (App. 5). The proof at trial indicated, however, that petitioner's threat on the President's life was not conditional. At trial Mrs. Cruz testified that petitioner stated that "he was going to kill the President" (App. 8, 12). Petitioner was not prejudiced by this variance. Count three was framed in the words of the statute. It contained the elements of the offense charged, fairly informed petitioner of the charge against him, and enabled him to plead an acquittal or conviction in bar of future prosecutions for the same offense. See *Hamling* v. *United States*, No. 73–507, decided June 24, 1974 (slip op. 27) .

sponded to a radio call that there was a disturbance at the Holiday Inn) arrived, he asked the waitress what the disturbance was, and, when informed, he confronted petitioner (App. 24–25). The following colloquy occurred, which was the basis of count four (App. 25):

> [Officer Page] * * * I said, "Did you make any reference to the President or make any threats to the President?"
> He said he didn't like the idea of the President going over and making friends with our enemies and they were going to take over the country and he didn't have to make friends with them and he was going to Washington. He said "I'm going to Washington and I'm going to beat his ass off. Better yet, I will go kill him."

Officer Page testified that petitioner stated that he was going to Washington, and that "he was walking up there because he didn't like cars" (App. 30).

Officer Page also testified that, while he was not "scared" by petitioner's remarks, he was "shook up" because "we had Presidents assassinated and attempted assassinations and I didn't know whether he was mad or whether he meant it" (App. 34–35). Officer Page took petitioner to police headquarters, where a Detective Burson interrogated him. According to Officer Page, Burson then told him to take petitioner to the V.A. hospital and place a "hold" on him, which he did (App. 32–33).

Detective Burson testified that petitioner stated that he was upset over the impending presidential trip

to China and that he was going to "whip President Nixon's ass" (App. 37). This was the basis of count five. Burson testified that he then had Page release petitioner (App. 38–39). Detective Burson stated that he ordered petitioner released because he did not realize that a violation of federal law might be involved (App. 40). Burson did, however, mail a copy of his report on the incident to a Mr. Farnsworth, the Secret Service agent in Shreveport (*ibid.*)[6] Mr. Farnsworth subsequently requested that petitioner be picked up and he was arrested on a federal warrant (App. 54).

Petitioner did not testify, but he called two witnesses who indicated that he had been drinking for several hours on the day before the incident (App. 45–48). However, each of the witnesses who had been present when petitioner threatened the President indicated that he or she did not believe he was drunk (*e.g.*, App. 9, 18, 37), although two of them said that their initial impression was that he was intoxicated (App. 16, 18, 20), and the arresting officer stated that he noticed a faint smell of alcohol on petitioner's breath (App. 27)[7].

---

[6] 18 U.S.C. 3056 authorizes the Secret Service, under the direction of the Secretary of the Treasury, to "protect the person of the President" and in implementation of that function to "detect and arrest any person violating any of the provisions of * * * [18 U.S.C. 871]."

[7] Petitioner was examined by a psychiatrist, Dr. Andrew Mullen, who testified, as a government witness, that in his opinion petitioner was competent on March 24, 1972, the date on which the alleged offense occurred. (App. 42). Dr. Mullen further testified that petitioner did not demonstrate any "dangerous tendencies" (App. 45). Petitioner did not raise insanity as a defense.

BEST COPY AVAILABLE

The case was submitted to the jury with the following instructions (App. 51):

> A true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered. This element is not established if the jury finds that the statement made is no more than a method of stating political opposition to the President or if it is only words of dislike against a political party or its platform.
>
> A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration of an apparent determination to carry out the threat.
>
> Before you convict a defendant under this statute, you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President.

The jury retired at 3:00 p.m. At 4:55 they sent out a note, asking "[w]ill the court accept the Verdict—'Guilty as charged with extreme mercy of the Court'?" The court instructed the marshal to answer "in the affirmative" (App. 52). Five minutes later (5:00 p.m.) the jury returned with a verdict of "guilty with extreme mercy" (Tr. 192). The jury was then polled (Tr. 192–193) and the court stated that it would give the recommendation of leniency consideration but the court also indicated that sentencing would also depend on matters contained in the pre-sentence report (*ibid.*). Subsequently, the sentence described above was imposed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate issue here is whether petitioner's conduct violated 18 U.S.C. 871(a), which prohibits any person from "knowingly and willfully" making a "threat" to take the life of or inflict bodily harm upon the President of the United States. All agree that only "true threats," as distinguished from statements made in jest or political hyperbole, are proscribed. *Watts* v. *United States,* 394 U.S. 705, 708. It is common ground as well that in determining whether a "true threat" has been made, the surrounding circumstances, including the context of the remarks, must be considered (Pet. Brief 45). And there is no disagreement that the statute, which is "constitutional on its face," 394 U.S. at 707, should be interpreted to avoid any conflict with the First Amendment. See *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347 (Mr. Justice Brandeis, concurring).

Beyond this, however, we enter the narrow area of dispute. For unless we misapprehend his position, petitioner would require as an element of the offense that the maker of the threat actually intended to carry it out or achieve some other prohibited purpose such as hindering the President's movements (Pet. Brief 27, 40–41, 43). In our view, however, actual intent to accomplish the threatened conduct need not be proven; rather, it is sufficient for conviction if a reasonable man hearing the threat would conclude that the defendant was apparently determined to carry it out.

The differences between these two standards are not great, but nevertheless are significant. The inner intentions of a person who announces that he will kill the President of the United States necessarily cannot be probed before federal resources are mobilized; whether made by someone in a crowd lining the route of a Presidential motorcade or in a place distant from the President's location at the moment, the threat itself commands immediate attention. Yet if, as petitioner suggests, 18 U.S.C. 871(a) prohibits "true threats" to the President only when the maker intends to carry them out, then the bluff, the boast, the "false alarm," the hoax all become immune from legal sanction despite the serious consequences such threats entail. Nothing in the First Amendment supports petitioner's construction of 18 U.S.C. 871(a) and the language of the statute and its purposes are against it.

Since the district court in this case properly instructed the jury that in order to convict it need not find that petitioner intended to carry out his threats

to the President, we would without more urge affirmance. But there is more. This record discloses serious questions concerning the validity of petitioner's conviction, questions however that relate to the jury's deliberations, not the legal standard embodied in the trial judge's instructions, which we believe were correct.

ARGUMENT

I. A DEFENDANT WHO VOLUNTARILY MAKES A DECLARATION, COMPREHENDING THE MEANING OF HIS WORDS, IS GUILTY OF AN OFFENSE UNDER 18 U.S.C. 871(a) IF A REASONABLE PERSON WOULD CONCLUDE THAT HIS DECLARATION CONSTITUTED A SERIOUS EXPRESSION OF HIS APPARENT INTENTION TO KILL OR INJURE THE PRESIDENT OF THE UNITED STATES

This case was submitted to the jury with an instruction on scienter taken *in haec verba* from *Ragansky* v. *United States,* 253 Fed. 643, 654 (C.A. 7), and *Roy* v. *United States,* 416 F. 2d 874, 877 (C.A. 9).[8] That part of instruction taken from *Ragansky* embodies the so-called apparent determination test:

> A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration of an apparent determination to carry out the threat.

This is the test for scienter that has been applied, almost without exception,[9] by the federal courts in

[8] App. 51.

[9] See *United States* v. *Patillo,* 431 F.2d (C.A. 4), adhered to *en banc,* 438 F.2d 13, discussed at n. 10, *infra.*

568—184—75——3

prosecutions under Section 871. See, *e.g., United States* v. *Lincoln,* 462 F.2d 1368, 1369 (C.A. 6), certiorari denied, 409 U.S. 952; *United States* v. *Compton,* 428 F.2d 18, 21–22 (C.A. 2), certiorari denied, 401 U.S. 1014; *Watts* v. *United States,* 402 F.2d 676, 678–680 (C.A.D.C.), reversed on other grounds, 394 U.S. 705; *United States* v. *Hart,* 457 F.2d 1087 (C.A. 10), certiorari denied, 409 U.S. 861; *United States* v. *Hall,* 493 F.2d 904 (C.A. 5), petition for a writ of certiorari pending, No. 73–7097.

The test establishes an objective standard for determining whether the declaration constitutes a "true" threat, an objective standard that is reinforced by the following additional instruction, which the trial court adopted from *Roy, supra,* 416 F.2d at 877–878, requiring the jury to find beyond a reasonable doubt:

> that the defendant intentionally made a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress or coercion.

The effect of the combined *Ragansky-Roy* instruction is that in order to convict for a violation of Section 871, the fact-finder must determine that a reasonable person hearing the defendant's declaration would conclude that it constituted a serious expression of his apparent intention to kill or injure the President. In our view, this standard embodies the correct interpretation of Section 871 and is consistent with the First Amendment.

Petitioner would have this Court reject the objective *Ragansky-Roy* standard. He appears to agree with the dissenting opinion in *Watts* v. *United States, supra,* 402 F. 2d at 687, that "specific intent to execute the threat [is] an element of the offense." [10]

A. THE STATUTE DOES NOT REQUIRE AS AN ELEMENT OF THE OFFENSE THAT THE DEFENDANT SUBJECTIVELY INTENDED TO CARRY OUT HIS THREAT TO KILL OR INJURE THE PRESIDENT

In discussing the meaning of 18 U.S.C. 871(a), we begin as we must with the statutory language: "Whoever knowingly and willfully * * * [makes] any threat to take the life of or to inflict bodily harm upon the President of the United States" or his successors is guilty of the offense. It is the threat itself that is

[10] Compare *United States* v. *Patillo,* 431 F. 2d 293 (C.A. 4), adhered to *en banc,* 438 F. 2d 13, which appeared to adopt this subjective intent requirement, 431 F. 2d at 297–298, but then retreated by stating that the necessary intent may be inferred from the words uttered and the context in which they were said (438 F. 2d at 16):

"We think that an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements, and that the trier of fact may find the latter intention from the nature of the publication of the threat, *i.e.*, whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President."

Since any threat that falls within the *Ragansky-Roy* objective standard can reasonably be expected to be brought to the attention of those having the responsibility of protecting the President, *Patillo* seems to embrace the objective standard while verbally rejecting it, as the dissenting *en banc* opinion by Judge Haynsworth points out. 438 F. 2d at 17.

punishable and, on its face, the statute does not impose any further qualification that the threat be one its maker intends to carry out. A person's declaration of his determination to kill the President, for example, could constitute a prohibited "threat" regardless of what his undeclared subjective intent would reveal.

Therefore, if the statute is said to require more, if it demands that a person subjectively intends to accomplish what he threatens, this must be inferred, if at all, from the phrase "knowingly and willfully." But those adverbs refer to and modify the act of making the threat and in no way imply that the maker must also inwardly desire to achieve what he outwardly professes. To illustrate, if a person knows or reasonably should know that his declaration "I am going to kill the President" will be construed as a threat on the President's life and he intentionally makes that declaration, he has committed an offense under the terms of 18 U.S.C. 871(a) even if *he alone knew* this was but a bluff or a hoax.

That this is the intended meaning of Section 871(a) is further indicated by the purposes of the statute and the evils it was designed to prevent. As the Court stated in *Watts* v. *United States, supra,* 394 U.S. at 707, citing the House Report on the bill,[11] "The Nation

[11] H. Rep. No. 652, 64th Cong., 1st Sess. Section 871 is derived from the Act of February 14, 1917, 39 Stat. 919. It was amended in 1955 to include the President-elect and Vice President within its terms (69 Stat. 80), and in 1962 to include the "Vice President-elect" (76 Stat. 956). The Floor Debates on the bill in the House are thoroughly reviewed in Chief Justice (then Judge) Burger's majority opinion in *Watts* v. *United States*, 402 F. 2d 676, 678–680 (C.A.D.C.), reversed on other grounds, 394 U.S. 705. While providing little illumination, the record does reveal one consistent theme: that "willful intent" was used to refer "to an intent "to threaten," not to carry out the threat. 402 F.2d at 679. As the dissent points out, at one point a congressman commented about "willful intent to do serious injury." 402 F. 2d at 687. But in view of the other statements on the Floor this is hardly a reliable guide. As Mr. Justice Frankfurter reminded: "To allow inexplicit remarks in the give-and-take of debate to contradict the very terms of legislation and the history behind it is to put out the controlling light on meaning shed by the explicit provisions of an Act in its setting." *United States* v. *United Mine Workers*, 330 U.S. 258, 319 (concurring opinion).

undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." Such threats, objectively viewed as serious and sincere, simply cannot be ignored. They compel a response by those charged with protecting the President and, by doing so, necessarily divert these federal resources. If the threat turns out to be a hoax or a bluff—or, perhaps more realistically, if it cannot readily be determined whether the maker actually intends to accomplish his avowed aim—the harm is nevertheless done.

Much in the same way, a person who announces by telephone that he will burn a certain building in five minutes, although he has no real intention of doing so, causes harm *because* the serious nature of his threat demands that the available resources respond to it. This is why the federal criminal code makes it an offense for any person knowingly to convey false information regarding an attempt to destroy an aircraft

BEST COPY AVAILABLE

or a motor vehicle. 18 U.S.C. 35(a). It would be strange indeed if a person who declares that he will blow up the automobile or airplane in which the President is travelling could successfully defend a Section 871(a) prosecution on the basis that he had no intention of carrying out his threat—a defense that would place him squarely in violation of 18 U.S.C. 35(a). See, *e.g.*, *United States* v. *Sullivan*, 329 F. 2d 755 (C.A. 2), certiorari denied, 377 U.S. 1005; *United States* v. *Allen*, 317 F. 2d 777 (C.A. 2).

Moreover, if the *only* purpose of Section 871(a) were to prevent harm to the President by convicting those who actually planned to carry out their threats, one might legitimately question whether the statute is antiproductive since it would force such persons to avoid announcing their inner intentions, thereby making their detection and identification all the more difficult. But the statute obviously had another, broader aim—to deter persons from threatening the life of the President in a manner that others reasonably would perceive as serious and sincere. By providing that such threats cannot be made with impunity regardless of the maker's subjective intent, Congress sought to ensure that the means employed to protect the President would be concentrated on that important task and not deflected by hoaxes, false alarms or purposeful bluffs.[12] Indeed, the "Warren Commission Report"

[12] We have been informed by the Secret Service that when information concerning a threat to the President is received, the following procedure is normally followed: 1) Secret Service records are checked to determine if the individual involved is the subject of a previous report; 2) attempts are made to locate and interview the individual and other persons who may be able to provide information about the individual; 3) records of other law enforcement agencies are checked to determine if they contain information that may be helpful in evaluating the threat. If the Secret Service agents in charge of the case conclude that a violation of Section 871 has occurred, the individual is arrested. See, generally, *The Report of the President's Commission on the Assassination of President Kennedy* (the "Warren Commission Report"), pp. 425–469 (1964).

(see n. 12, *supra*), in discussing the difficulties involved in the protection of the President, specifically noted that "crank" threats had the deleterious effect of diverting the resources of the Secret Service. *Id.* at 428–432.

Section 871(a) does of course require as an element of the offense that the person "willfully" make the threat on the President's life. But the broad observation that "willfully" is a term that "generally means an act done with a bad purpose," *United States* v. *Murdock*, 290 U.S. 389, 394, hardly advances the inquiry into its meaning here.[13] What matters is how the term is used in Section 871(a) in light of its context and the purpose of the statute. See *Spies* v. *United States*, 317 U.S. 492, 497; *Screws* v. *United States*, 325 U.S. 91, 101–104.[14] Since nothing in Section 871(a) remotely suggests that only a threat to the President made with some "evil intent" apart from the threat itself is prohibited, "willfully" must mean "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." *Browder* v. *United States*, 312 U.S. 335, 341. In substance,

[13] Compare the panel opinion in *United States* v. *Patillo*, *supra*, 431 F. 2d at 297.

[14] See *Working Papers of the National Commission on Reform of Federal Criminal Laws* 128, 148–150 (1970).

that is what the trial court in this case instructed the jury. See p. 8, *supra*. This interpretation fulfills Section 871(a)'s objective of deterring deliberate and voluntary threats while not imposing punishment on those who unintentionally engage in such conduct.[15]

The objective standard of *Ragansky* and *Roy* further ensures that only the "threats" at the core of congressional concern will be prohibited by Section 871(a), that is, only those declarations of a determination to kill or injure the President that a reasonable man would construe as indicating the maker's apparent intention to accomplish his stated aim. Any further requirement that the person making the threat must actually intend to carry it out would render the statute wholly ineffectual to deal with the evils it was designed to prevent.[16]

[15] In *Murdock*, *supra*, this Court indicated that a comparison of similar statutes is helpful in construing the term "willfull". That the term "willfully", as used in Section 871, means no more than intentionally is supported by a consideration of other federal statutes that punish "threats." For example, 18 U.S.C. 875(b) prohibits the transmission in interstate commerce, and the second paragraph of 18 U.S.C. 876 prohibits the mailing, of communications threatening kidnapping or injury of any person "with intent to extort * * * any money or other thing of value." In these states, Congress recognized the difference between threats *per se* and threats uttered to achieve a particular purpose, and deemed both to be culpable (although not to the same degree). Section 875(c) and the third paragraph of Section 876 prohibit, respectively, the "knowing and intentional" transmission in interstate commerce and mailing of communications threatening kidnapping or injury, without more. See, *e.g.*, *Bass* v. *United States*, 239 F. 2d 711, 716 (C.A. 6); *United States* v. *Holder*, 302 F. Supp. 296 (D. Mont.), affirmed on opinion of the district court, 427 F. 2d 715 (C.A. 9); see also *United States* v. *Maisonet*, 484 F. 2d 1356 (C.A. 4); *United States* v. *LeVision*, 418 F. 2d 624 (C.A. 9). The difference between Section 875(b) and Section 875(c) and between the second and third paragraphs of Section 876 is that extortionate threats are punishable by twenty years' imprisonment and a $5,000 fine while simple threats are punishable by five years' imprisonment and a $1,000 fine, as Section 871 also provides. See also 18 U.S.C. 877.

B. THE OBJECTIVE *RAGANSKY-ROY* STANDARD SATISFIES THE DEMANDS OF THE FIRST AMENDMENT

If "threats," as used in Section 871(a), were given the broadest possible meaning, the First Amendment might be invoked against such an interpretation. A declaration or announcement, for example, that the "President must be killed and I will do it" may take on a different character when made during a political speech. It is, to be sure, a crude offensive way for the speaker to make his point of political opposition, but although declarations of this sort may not be at the core of the First Amendment, they are at least on the periphery. Accordingly, this Court held in *Watts* v. *United States*, *supra*, 394 U.S. at 708, that in light of First Amendment considerations Section 871(a) pro-

[16] 18 U.S.C. 844(e) also supports our position regarding the proper construction of willfulness as used in Section 871. Section 844(e) provides that "[w]hoever * * * willfully makes any threat or maliciously conveys false information * * * concerning an attempt" to kill or injure any person or to destroy any property by means of an explosive shall be punished by a maximum of five years" imprisonment and a $5,000 fine. The word "willfully" as used in Section 844(e) has been held not to require a present intention to carry out the threat. See *United States* v. *Nusz*, 462 F. 2d 617 (C.A. 9).

hibits only "true threats," not political hyperbole[17] which may often be "vituperative, abusive, and inexact."

Petitioner contends, however, that this limitation on the scope of Section 871(a) is not sufficient and that the First Amendment demands that the Court read into Section 871(a) a requirement that the maker of the threat actually intend to carry it out.[18] Emphasizing that what is made punishable by Section 871(a) is "pure speech," petitioner implies that the First Amendment acts as a shield against conviction for uttering words alone (*e.g.*, Pet Brief 15).[19] But it is difficult to see the point in this. If, as petitioner con-

[17] The Court concluded in regard to the defendant's declaration in *Watts*: "Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." 394 U.S. at 708.

[18] We note that this Court in *Watts* v. *United States*, *supra*, 394 U.S. at 708, said it had "grave doubts" about the correctness of the *Ragansky* objective standard, but did not say why.

[19] Petitioner apparently contends that the First Amendment requires the imposition of either an "actual intent" test or the "clear and present danger" test because he assumes—erroneously—that the primary purpose of Section 871 is to prevent incitement to harm the President. Although incitement was a prominent element in certain early decisions under the statute (*e.g.*, *United States* v. *Stickrath*, 242 Fed. 151 (S.D. Ohio); *United States* v. *Jasick*, 252 Fed. 931 (E.D. Mich.)), the purpose of the statute is not so limited, as we have discussed above (pp. 14–17). Cases such as *Brandenburg* v. *Ohio*, 395 U.S. 444; *Schenck* v. *United States*, 249 U.S. 47; *Debs* v. *United States*, 249 U.S. 211; and the dissenting opinion in *Gitlow* v. *New York*, 268 *U.S.* 652, and concurring opinion in *Whitney* v. *California*, 274 U.S. 357, are thus inapplicable to the statute at issue here.

tends (*id.* at 15–22), the prevalent interpretation of Section 871(a) allows an individual to be punished merely for uttering "bad words," requiring proof of specific intent to execute the threat would do no more than permit punishment for thinking "bad thoughts."

Moreover, there is no constitutional prohibition merely because what is made criminal can be characterized as "pure speech." Many federal criminal statutes punish words alone[20] and yet no one could reasonably contend that the First Amendment forbids this. Indeed, this Court has held that state statutes may constitutionally punish those who use "fighting words" since the First Amendment does not confer absolute protection for all utterances "at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571. There are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (*id.* at 571–572), and "true threats" to harm or kill the President are surely within that category.

A "true threat" cannot realistically be considered advocacy. It does not seek to persuade the hearer nor does it invite rational discourse. It is rather an affirmation of the speaker's apparent determination or intention. A "true threat" differs from protected speech because it cannot be neutralized by a

[20] See *e.g.*, 18 U.S.C. 875–877, and 844(e), discussed in nn. 15, 16, *supra;* 18 U.S.C. 401 (contempt); 18 U.S.C. 1621, 1623 (perjury); 18 U.S.C. 1503, 1505, 1509–1510 (obstruction of administrative or judicial proceedings or investigations by threats); 18 U.S.C. 245 (interference with federally protected activities by threats).

BEST COPY AVAILABLE

verbal response from the hearer. Thus, it does not implicate the central policy of the First Amendment that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies." *Dennis* v. *United States*, 341 U.S. 494, 503.

A "true threat" is punishable, not primarily because it may incite others, but because the utterance itself produces an evil that Congress may prohibit. Such a declaration demands investigation by those charged with the security of the President, thereby diverting their resources and, in the process, tending to restrict Presidential activities. An immediate restriction may not result in every case, but culpability cannot depend on the fortuitious circumstances of the President's travel plans, which may be unknown to the maker of the threat. To hold that threats may be made with impunity unless an immediate restrictive effect occurs, is to ignore that the greater the number of threats, the more pervasive the restriction on Presidential activities becomes. Because a "true threat" is likely to be communicated to those charged with the President's security, it is therefore punishable without proof of its actual effect in a given case.[21]

[21] Threats to do bodily harm or kill another are punishable in part because they may cause apprehension. The President, because of the comprehensive security arrangements provided him, may not be put in fear by threats. But it scarcely follows that the security system, called into being by a history of actual and threatened violence, confers a license to threaten the Chief Executive.

Thus, far from fostering debate on public issues, threats made on the President's life substitute the specter of violence for the free exchange of ideas. Even if a "true threat" is regarded in some sense as advocacy, it would not be shielded by the First Amendment. As Mr. Justice Holmes wrote for this Court in *Frohwerk* v. *United States*, 249 U.S. 204, 206:

> * * * [T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. [Citation omitted.] We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

As the Court indicated in *Watts*, a "true threat" is therefore outside the scope of the First Amendment. Of course, this is not to say that when a statute such as Section 871 "makes criminal a form of pure speech" (*Watts* v. *United States, supra*, 394 U.S. at 707), it can be interpreted in a manner "susceptible of application to protected expression." *Gooding* v. *Wilson*, 405 U.S. 518, 523. The *Ragansky-Roy* test embodied in the trial court's instruction properly avoids this by distinguishing a "true threat" from constitutionally protected speech.

The test establishes an objective standard similar to that used in *Chaplinsky* v. *New Hampshire, supra*, 315 U.S. at 573, a test this Court endorsed in *Gooding*

v. *Wilson, supra.*[22] See also *Cohen* v. *California,* 403 U.S. 15, 20; *Coates* v. *City of Cincinnati,* 402 U.S. 611, 613 n. 3. Properly applied, it does not permit punishment of protected speech, a point the trial judge underscored here by giving the additional instruction that a "true threat" is "not words uttered as a mere political argument, idle talk, or jest" (App. 51), and does not exist if "the statement made is not more than a method of stating political opposition to the President * * *" (*ibid.*).[23]

Of course, juries may on occasion misapply whatever standard is announced, and trial courts must be alert to prevent this. But the instruction given by the trial court here was precise and specific; it did not "license the jury to create its own standard in each case" (*Herndon* v. *Lowry,* 301 U.S. 242, 263). This is all that can be reasonably demanded.[24] The possibility

[22] In *Chaplinsky*, the New Hampshire court had held "[t]he test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." See *State* v. *Chaplinsky* 91 N.H. 310, 320–321, 18 A. 2d 754, 762.

[23] While this additional instruction is not a substantive addition to the apparent determination - reasonable man test of *Ragansky* and *Roy*, it is in our view a helpful clarifying instruction.

[24] As this Court stated in *Hamling* v. *United States*, No. 73–507, decided June 24, 1974 (slip op. 11):

"The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth* v. *United States*, 354 U.S., at 492 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.'"

of misapplication does not present the kind of "chilling effect" that justifies a more stringent test.[25]

The alternative of a more stringent standard, that is, the imposition of an actual intent requirement, could be adopted only at the cost of transmuting the statute into one more nearly resembling a prohibition of attempts. That is contrary to what Congress intended; it overlooks the fact that the effect of a "true threat" is not dependent on the subjective state of mind of the utterer but on the content of the words and circumstances in which they were uttered as objectively measured.

In sum, a "true threat" is "no essential part of any exposition of ideas" (*Chaplinsky* v. *New Hampshire, supra,* 315 U.S. at 572). Public debate "should be uninhibited, robust, and wide-open, and * * * it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270). But assassination threats are beyond the pale of the First Amendment.

II. SUBSTANTIAL QUESTIONS ARE PRESENTED CONCERNING THE VALIDITY OF PETITIONER'S CONVICTION

Although we believe that petitioner was convicted by a jury that had been properly instructed, we never-

[25] In *Dennis*, *supra*, Mr. Justice Frankfurter observed that the danger arising from a statute punishing advocacy of overthrow of the government is that it may restrain those who do not advocate overthrow but fear that their words may be misunderstood. 341 U.S. at 549. Section 871(a) does not present a comparable danger. Its prohibition is specific; it punishes threats to harm or kill the President. To the extent the statute causes people to avoid language that may be construed as a threat, its incursion on First Amendment interests is slight.

theless bring to the Court's attention substantial questions that concern the validity of his conviction. These questions arise, however, from a consideration of certain actions taken by the district court, not from any application of an erroneous legal standard. Indeed, petitioner's conviction does not, in our view, pose serious First Amendment issues. His remarks were not made in jest and they cannot realistically be described as political hyperbole.[26] While petitioner's remarks taken in context may raise the question whether they could objectively be considered serious, if that question is answered in the negative, the remarks constituted a form of speech that Congress simply did not proscribe in Section 871(a).[27]

The scope of judicial review of sufficiency of the evidence to support a conviction is narrow. It is not for the courts "to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, tak-

[26] A "true threat" is not protected by the First Amendment merely because it is motivated by political opposition. Although petitioner expressed his opposition to President Nixon's China policy, the content and context of his remarks are in contrast to the facts in *Watts* v. *United States*, *supra*. In *Watts*, the defendant's remarks occurred at a political rally and were conditional in nature: "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706.

[27] It is unnecessary to consider whether Congress could constitutionally punish a non-serious declaration of intent to kill the President. It has not done so. We note, however, that resolution of the question would depend on the extent to which there are constitutional limitations on the legislative power substantively to define crime. See, *e.g.*, *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558; *Powell* v. *Texas*, 392 U.S. 514.

ing the view most favorable to the government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80. In stating this narrow scope of review, the Court recognized that an appellate record may not reveal all the factors that a jury was legitimately entitled to consider in reaching its verdict. Because of the policy reflected by the standard of review, because petitioner's conviction was affirmed by a unanimous court of appeals, and because any review of the sufficiency of the evidence may be affected by other factors in this case (*e.g.*, the form of the jury verdict, the relatively harsh sentence imposed, and the multiple counts based on statements made to police officers),[28] we do not analyze the conviction solely in these terms.

Rather, we focus on two factors directly related to the integrity of the verdict. The first concerns the form of the verdict ("guilty with extreme mercy"). As we indicated in our memorandum in opposition to the petition for a writ of certiorari, the form of the verdict presents a troublesome issue. While the form of the verdict may not in itself constitute reversible error, here it cannot be viewed in isolation; it is, at least in part, the product of the trial judge's unilateral communication with the jury.

[28] We adhere to the view expressed in our memorandum in opposition to the petition for a writ of certiorari that counts based on statements made to police officers in the course of investigation rather than as affirmations would pose a substantial issue (Government's Memorandum, p. 10, n. 4). As we indicated, however, this Court need not consider the question since petitioner received concurrent sentences on all counts. See *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

The issue raised by these events was not presented to the court of appeals (and, indeed, petitioner does not present it now). Ordinarily the question would not be open for review in this Court. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362–363, n. 16. But the peculiar circumstances here tend to make this an "exceptional" case,[29] warranting further consideration.[30] The record reveals that at 4:55 p.m., after it had deliberated for nearly two hours, the jury sent the following note to the judge: "Will the Court accept the Verdict—'Guilty as charged with extreme mercy of the Court'?" (App. 52). Without notifying counsel,

[29] The very fact that the trial court engaged in a "unilateral" communication with the jury, undisclosed to counsel, mitigates petitioner's failure to raise the issue below. Indeed, we discovered that the court's communication was not disclosed to counsel only in the course of preparation of this brief, and the United States Attorney informs us that his office was unaware of the Court's communications.

[30] The transcript does contain the following record of the acceptance of the verdict, which at least put petitioner's counsel on notice that the jury communicated with the court (although it did not indicate that the court unilaterally communicated with the jury) (Tr. 192–193):

"The COURT. We understand from a note you sent to the court the verdict finds him guilty on all five counts but that you wish to recommend extreme mercy; is that correct?

"The FOREMAN. Yes, your Honor.

"The COURT. Will you please poll the jury. (Whereupon the jury was polled and all jurors answered in the affirmative.)

"The COURT. Let the verdict be entered as the judgment of the Court. Certainly the Court will take into consideration your recommendation of mercy, but before we can act upon the case, we will have the Probation Officer make a presentence investigation report. We do not know whether the man has a prior criminal record or not and we will certainly take into account what you have recommended."

the court instructed the marshal to advise the jury "that the Court's answer was in the affirmative" (*ibid.*). Five minutes later, at 5:00 p.m., the jury returned its verdict in the form indicated above.

Ordinarily, when a jury makes a recommendation of mercy without statutory authorization, the recommendation may be regarded as surplusage and it does not affect the validity of the verdict. See, *e.g.*, *Cook* v. *United States*, 379 F. 2d 966 (C.A. 5); *Krull* v. *United States*, 240 F. 2d 122 (C.A. 5) (dictum), certiorari denied, 353 U.S. 915; *Thlinket Packing Co.* v. *United States*, 236 Fed. 109 (C.A. 9); *United States* v. *Mankowski*, 179 F. Supp. 667 (E.D. Wis.). In *Cook*, *supra*, however, the Fifth Circuit held that there is an exception to this general rule where the circumstances surrounding the recommendation of leniency cast doubt upon the unqualified nature of the verdict, and in such cases the verdict cannot be accepted without further inquiry.

In *Cook* the jury returned a verdict of guilty with a notation that requested the court to give the defendant "* * * every degree of leniency possible" (379 F. 2d at 968). The jury was polled, with one juror stating that he was initially reluctant to convict, one juror responding "guilty," and ten jurors responding in substantially the following language: "Guilty, as noted at the bottom of the verdict" (*id.* at 969). The defendant then requested that the jurors be asked whether their guilty vote was qualified by the recommendation of mercy (*ibid.*). The trial court refused to

make further inquiry, and on appeal the Fifth Circuit reversed.

The present case differs from *Cook* in that no member of the jury indicated any reluctance to vote for conviction, and, in addition, the court, before polling the jury, described the verdict as a finding of guilt with a recommendation. The foreman agreed with that description and the jury unanimously affirmed the verdict. See n. 30, *supra.*

Moreover, unlike *Cook,* here petitioner did not request further inquiry of the jury. Such inquiry must be requested prior to the recording of the verdict (Rule 31(d), Fed. R. Crim. P.) in order to allow the court an opportunity to correct any deficiencies in the verdict before the jury is dismissed. In failing to request a further inquiry, petitioner arguably waived any defects in the verdict. See, *e.g., United States* v. *Marr,* 428 F. 2d 614 (C.A. 7); *Mull* v. *United States,* 402 F. 2d 571 (C.A. 9), certiorari denied, 393 U.S. 1107; *Jackson* v. *United States,* 386 F. 2d 641 (C.A.D.C.); *United States* v. *Neal,* 365 F. 2d 188 (C.A. 6).

However, in light of the content of the court's communication and the fact that it was made without informing counsel, it is not merely a defect in the verdict that is involved here. A trial court should not instruct the jury simply that it may make a recommendation of leniency. When the jury inquires about its power to recommend mercy, a responsive instruction should *not* be confined to a bare affirmance of the jury's power. Rather, the jury should be informed that it has no sentencing function, that it must reach

its verdict without regard to the sentence to be imposed, and that if it makes a recommendation, it is not binding on the court. Here the trial court conveyed none of this information in response to the jury's note.

Moreover, when as here a jury makes an inquiry that is tantamount to a request for further instructions, the court should respond only after giving counsel an opportunity to be heard on the matter. See *Shields* v. *United States,* 273 U.S. 583; *United States* v. *Glick,* 463 F. 2d 491 (C.A. 2); *United States* v. *Schor,* 418 F. 2d 26, 29–30 (C.A. 2). This rule is based on the defendant's right, provided by Rule 43, Fed. R. Crim. P., to be present "at every stage of the trial." Although a violation of Rule 43 may be harmless error in many cases (see, *e.g., United States* v. *Calabro,* 467 F. 2d 973, 989 (C.A. 2); *United States* v. *Arriagada,* 451 F. 2d 487 (C.A. 4)), we believe that in the circumstances of this case the district court's action was prejudicial and therefore requires reversal of the conviction.

In *United States* v. *Glick, supra,* almost identical facts were involved. There, the jury had inquired whether it could recommend leniency and the district court, without informing counsel, replied in the affirmative. The court of appeals reversed, holding (463 F. 2d at 494):

> [T]he bare assertion that the jury could recommend leniency, omitting any limiting or restricting admonitions and given in [the defendant's] absence, was highly prejudicial.

The reasoning of *Glick* is equally applicable here. The district court's communication, coming as it did in the course of jury deliberations, may have induced the breaking of a deadlock by giving the jury the impression that its recommendation might be an acceptable compromise.[31] See, *e.g.*, *Demetree* v. *United States*, 207 F. 2d 892, 895–896 (C.A. 5). The court's response thus improperly invited the jury to consider punishment in reaching its verdict. *Cf. United States* v. *Bishop*, *supra*, 412 U.S. 346, 361.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed on the ground that the district court violated Rule 43, Fed. R. Crim. P.[32]

Respectfully submitted,

ROBERT H. BORK,
Solicitor General.
JOHN KEENEY,
Acting Assistant Attorney General.
A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General.
WILLIAM L. PATTON,
Assistant to the Solictor General.
MARSHALL TAMOR GOLDING,
Attorney.

JANUARY 1975.

---

[31] The fact that the jury returned its verdict almost immediately after the court responded to the note indicates as much.

[32] If petitioner's conviction is reversed, he will not be retried.

U.S. GOVERNMENT PRINTING OFFICE: 1975